Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

No. 96-507

In The

Supreme Court of the United States

October Term, 1996

JAMES GRAHAM,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT W. KOPP
Counsel of Record
BOND, SCHOENECK & KING, LLP
Attorneys for Respondent
One Lincoln Center
Syracuse, New York 13202
(315) 422-0121

9870
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

23 pp

LIST OF INTERESTED PARTIES

The Petitioner is James Graham.

Respondent Niagara Mohawk Power Corporation is a publicly held New York corporation. Niagara Mohawk Power Corporation has no parent company and has only one nonwholly owned subsidiary, Canadian Niagara Power Company, Ltd.

TABLE OF CONTENTS

	Page
List of Interested Parties	i
Table of Contents	ii
Table of Citations	iii
Statement of Jurisdiction	1
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below	3
B. Correction of Misstatements in the Petition	4
Reasons for Denying the Writ	5
I. This Court Lacks Jurisdiction Because The New York State Court Decision Rests Upon The Independent State Law Grounds Adequate To Support Judgment.	5
A. The New York Human Rights Law Does Not Prohibit Inquiries Into An Unescorted Access Applicant's Criminal History.	6
B. Petitioner Was Not Protected By The Human Rights Law Because He Misrepresented His Criminal History.	10

Contents

	Page
II. The State Court Decision Is Consistent With Prior Decisions Of This Court And Other Federal Courts.	11
A. The Security Act Expressly Preempts The Human Rights Law's Restrictions On Criminal History Inquiries.	12
B. Petitioner's Human Rights Law Arguments Conflict With Federally Mandated Nuclear Safety And Security Requirements	14
Conclusion	16

TABLE OF CITATIONS

Cases Cited:

Coleman v. Thompson, 501 U.S. 722 (1991)	5, 6, 11
County of Rockland v. NRC, 709 F.2d 766 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983)	14
English v. General Electric Co., 490 U.S. 72 (1990)	15
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	12
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	5, 6
Herb v. Pitcairn, 324 US 117 (1945)	6

Contents

	Page
Hines v. Davidowitz, 312 U.S. 52 (1941)	12
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	12
Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972)	14, 15
Pacific Gas & Electric v. State Energy Resources Conservation and Dev. Comm'n, et al., 461 U.S. 201 (1983)	14, 15
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) ..	12
Siegel v. Atomic Energy Comm'n, 400 F.2d 778 (D.C. Cir. 1968)	14
Stewart v. Civil Service Commission, 84 A.D. 2d 491, 446 N.Y.S. 2d 948 (1st Dept. 1982)	10, 11
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)	14
Statutes Cited:	
5 U.S.C.A. § 9101(b)(1) (West 1996)	7
15 U.S.C.A. § 78(q) (West 1981)	7
28 U.S.C.A. § 1257(a) (West 1993).	1

Contents

	Page
42 U.S.C.A. § 2169 (West 1995)	7
42 U.S.C.A. § 2169(a) (West 1995)	9, 12, 13
42 U.S.C.A. § 5841 (West 1983)	7
42 U.S.C.A. § 5844 (West 1983)	7
N.Y. Banking Law § 22 (McKinney's 1986)	7
N.Y. Executive Law § 296(16) (McKinney's 1986)	3, 7
N.Y. General Business Law § 72 (McKinney's 1986)	7
N.Y. Racing, Pari-Mutuel Wagering & Breeding Law § 309 (McKinney's 1986)	7
Rules Cited:	
Supreme Court Rule 10	11
Supreme Court Rule 15.2	4
Other Authorities Cited:	
10 C.F.R. § 10.11(a)(8)-(9) (1993)	8, 9
10 C.F.R. § 50.34 (p)(2) (1993)	8
10 C.F.R. § 73.56(a) (1993)	8, 15

Contents

	Page
10 C.F.R. § 73.56(b)(1) (1993)	8
10 C.F.R. § 73.57(b)(8) (1993)	9, 10
10 C.F.R. § 73.57(c)(i) (1993)	9
S. Rep. No. 143, 99th Cong., 1st Sess. 1 (1985)	14

Respondent Niagara Mohawk Power Corporation ("Niagara Mohawk" or the "Company") asks the Court to deny the petition for writ of certiorari of Petitioner James Graham ("Petitioner"). The petition seeks review of a New York state court dismissal of a state law cause of action. The decision of the New York Supreme Court was unreported. It was affirmed, without opinion, by the New York Appellate Division at 635 N.Y.S. 2d 405 (4th Dep't 1995) and, thereafter, leave to appeal was denied by the New York Court of Appeals at 667 N.E. 2d 378 (1996), *petition for cert. filed*, 65 U.S.L.W. 3295 (U.S. July 29, 1996) (No. 96-507). (For the convenience of the Court all citations to the lower court decisions will be to those attached as Appendices to the petition).

STATEMENT OF JURISDICTION

Niagara Mohawk respectfully submits that the decision below rests upon independent state law grounds that are adequate to support judgment. Therefore, this Court lacks jurisdiction over this petition under 28 U.S.C.A. § 1257(a) (West 1993). *See* pp. 6-7 below.

STATEMENT OF THE CASE

Niagara Mohawk opposes the petition for two independent, compelling reasons. First, Petitioner's arguments are not supported by the New York statute in question, nor by its prior application by the New York state courts. Second, if Petitioner's interpretation of the New York State statute were correct, the state law would restrict, and potentially compromise, unescorted access clearance requirements at a nuclear power plant. Because these access requirements were established in accordance with the federal nuclear safety statutes and regulations, Petitioner's state law claim would be preempted by federal law.

The material facts in this case are not disputed. Between September 1990 and March 1992, Petitioner applied to Niagara Mohawk for unescorted access clearance to work at the Nine Mile Point Nuclear Power Station in Scriba, New York ("Nine Mile Point"), on two separate occasions. Petitioner was asked about his arrest record as part of a general background screening process that included certain inquiries about criminal history. On both occasions, Petitioner responded, under oath, that he had never been arrested. Niagara Mohawk discovered that Petitioner had misrepresented his arrest record when it received a comprehensive criminal history report from the FBI. Niagara Mohawk's security personnel subsequently interviewed Petitioner and determined that his "trustworthiness and reliability" had been called into question. The Company therefore denied Petitioner's unescorted access application, finding that he could not satisfy the minimum requirement necessary for clearance under the applicable federal laws or the Nine Mile Point security plan.

Petitioner contends that, under New York law, Niagara Mohawk should not have asked him these questions about his arrest record and that, therefore, he should be excused from his failure to be candid and forthright about his prior arrest record. The New York state courts rejected Petitioner's arguments not only because they conflicted with the compelling interests reflected in the federal nuclear safety laws, but also because they were not supported by a plain reading of the New York statute in question or the facts in this case.

For the reasons explained below, Niagara Mohawk respectfully submits that there is no jurisdictional or substantive basis for this Court to disturb the determination of the New York state courts in this matter.

A. Course of Proceedings and Disposition of the Case Below

Petitioner commenced this action in New York Supreme Court, Onondaga County, on February 8, 1993. In his initial complaint, Petitioner asserted only a single cause of action under the New York Human Rights Law, N.Y. Executive Law § 296(16), (McKinney's 1986) (the "Human Rights Law"), alleging that Niagara Mohawk's unescorted access screening process violated that statute's restrictions on criminal history inquiries. The Company answered the complaint by indicating that Petitioner was not denied unescorted access to Nine Mile Point because of his criminal history, but rather because he failed on two separate occasions to respond accurately and completely to questions during the security clearance application process. The Company additionally explained that its inquiries and decision with respect to Petitioner's unescorted access application were fully authorized by the federal nuclear safety and security laws and the regulations promulgated thereunder by the United States Nuclear Regulatory Commission ("NRC").

On April 6, 1993, Petitioner served an Amended Complaint in which he restated the same factual allegations and asserted additional causes of action, including one purportedly based upon the federal nuclear safety laws and regulations. Niagara Mohawk answered the Amended Complaint and removed the action to the United States District Court for the Northern District of New York on April 26, 1993. Niagara Mohawk thereafter moved for summary judgment following the necessary discovery. With respect to Petitioner's federal claims, the district court accepted Niagara Mohawk's argument that Petitioner did not have a private right of action under the federal nuclear statutes or regulations. (Petition, App. 3). The district court dismissed Petitioner's federal claim, but declined to exercise supplemental jurisdiction over his remaining state

law claims. (*Id.* at App. 4). This action therefore was remanded to the New York Supreme Court, Onondaga County, on May 17, 1994.

On August 16, 1994, Niagara Mohawk renewed its motion for summary judgment in New York Supreme Court. Following oral argument, New York Supreme Court Justice Leo Hayes granted Niagara Mohawk summary judgment on Petitioner's Human Rights Law claim for several reasons. First, Justice Hayes found that ". . . the Nuclear Regulatory Commission approved the security plan and the various application forms used by Niagara Mohawk, and that federal law pre-empts applicable state law in this field." (Petition, App. 8). Second, Justice Hayes held that, even assuming, *arguendo*, that there is no pre-emption, Niagara Mohawk's inquiries did not violate the Human Rights Law because they were "required or permitted" by the nuclear regulatory laws. *Id.* Finally, Justice Hayes held there was no triable issue of the fact under the Human Rights Law in any event as the Petitioner was not denied access because of his criminal history, but rather because he was less than truthful on his unescorted access application. *Id.*

On November 15, 1995, the New York Supreme Court, Appellate Division, Fourth Department, affirmed Justice Hayes' decision unanimously, without opinion. (*Id.* at App. 10). The New York State Court of Appeals thereafter denied Petitioner's Motion for Leave to Appeal. (*Id.* at App. 15). The petition for writ of certiorari was filed with this Court on July 29, 1996.

B. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, Niagara Mohawk brings the Court's attention to the fact that

there were actually three independent grounds for the dismissal of Petitioner's Human Rights Law claim.

The petition correctly states that Justice Hayes "ruled that: (1) by reason of the regulation[s], the statute allowed the question to be asked, and (2) even if Niagara Mohawk violated the New York statute, the statute was superseded by the regulations." (Petition, 5). However, as noted above, Justice Hayes additionally ruled that:

> [t]he affidavits and documentation submitted by [Niagara Mohawk] support its position that it did not deny [Petitioner] access based upon his history of arrests, but rather his lack of trustworthiness and reliability when, after the routine F.B.I. check, it became obvious that [Petitioner] was less than truthful on his certification applications.

(Petition, App. 8).

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE NEW YORK STATE COURT DECISION RESTS UPON INDEPENDENT STATE LAW GROUNDS ADEQUATE TO SUPPORT JUDGMENT.

This Court declines to review questions of federal law decided by a state court whenever the state court's decision ". . . rests on a state law ground that is independent of a federal ground and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see also Fox Film Corp.*

v. Muller, 296 U.S. 207, 210 (1935). Indeed, this Court has recognized that this "independent and adequate state ground doctrine" is jurisdictional. *Coleman v. Thompson*, 501 U.S. at 729 (stating that "[b]ecause this Court has no power to review a state law interpretation that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.").

Niagara Mohawk respectfully submits that any one of the three grounds set forth in Justice Hayes' decision is adequate to support the dismissal of Petitioner's claims under the Human Rights Law. While the first ground is rooted in federal law (*i.e.*, preemption), the other two grounds were based upon Justice Hayes' interpretation and application of New York state law. These independent state law grounds make it unnecessary to reach the preemption question and thus are sufficient to preclude review by this Court. *Id; see also Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) (stating that "[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views on federal laws, our review could amount to nothing more than an advisory opinion.").

A. The New York Human Rights Law Does Not Prohibit Inquiries into an Unescorted Access Applicant's Criminal History.

Justice Hayes correctly recognized that the Human Rights Law, on its face, does not prohibit all criminal history inquiries. Instead, the statute expressly excludes from the prohibition any inquiry that is "required or permitted" by other laws.

In adding the "required or permitted" exception to the Human Rights Law, the New York State Legislature recognized

that inquiries about an applicant's prior arrest record are clearly relevant and appropriate in certain occupations. This exception was necessary because many New York State and federal laws related to issues of public health or safety authorize such inquiries. *See, e.g.*, 5 U.S.C.A. § 9101(b)(1) (West 1996) (criminal history information must be made available for the purpose of determining eligibility for access to classified information and national security duties); 15 U.S.C.A. § 78(q) (West 1981) (members of Securities Exchange Commission and brokers, dealers, etc., must submit to criminal history investigation); N.Y. General Business Law §§ 72, 81 (McKinney's 1986) (applicants for private investigator, watch, patrol, or guard agency license must submit to criminal history investigation); N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 309 (McKinney's 1986) (same for participants or employees at harness racing tracks); N.Y. Banking Law § 22 (McKinney's 1986) (same for applicants for licensed lenders, service agencies). The Legislature did not attempt to limit the scope of this exception by listing all of these laws in Executive Law § 296(16). It instead left the exception open-ended by incorporating by reference all federal and state laws "requiring or permitting" such inquiries.

Niagara Mohawk was "required or permitted" to inquire into Petitioner's criminal history pursuant to the regulatory scheme established by Congress under the Energy Reorganization Act of 1974, 42 U.S.C.A. § 5841 *et seq.* (West 1983) ("ERA"), and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 42 U.S.C.A. § 2169 (West 1995) (the "Security Act"). In the ERA, Congress established the NRC and directed that agency to develop and implement sufficient licensing and regulatory requirements for entities licensed to operate nuclear power plants to promote their safe and efficient operation and to guard against "threats, thefts and sabotage at those facilities." 42 U.S.C.A. §§ 5841 and 5844.

Pursuant to this statutory direction, the NRC promulgated regulations requiring all licensees to develop a physical security plan for their nuclear power plants that includes a "personnel access authorization program" covering those individuals working in "protected and vital areas" of the facility. 10 C.F.R. § 73.56(a) (1993).[1] The NRC's stated objective in requiring personnel access authorization programs was to "provide high assurance that individuals granted unescorted access are *trustworthy and reliable* and do not constitute an unreasonable risk to the health and safety of the public . . ." *Id.* (emphasis added).

The NRC regulations expressly require licensees to develop information that, "at a minimum," is sufficient to permit a background investigation concerning the "criminal history" of all unescorted access applicants. 10 C.F.R. § 73.56(b)(1) (1993). This broad NRC minimum standard clearly requires, or at the very least permits, licensees to inquire into the unescorted access applicant's prior arrest activity. There are several reasons that compel this conclusion. First, the NRC regulations do not direct licensees to develop information only with respect to the applicant's "conviction history." To the contrary, the NRC regulations employ the term "criminal history" because it is obviously broader and encompasses both arrests and convictions. If the NRC intended to limit the background checks to convictions only, it knew how to do so. The NRC regulations applicable to the granting of access to prospective or current NRC employees to certain secured information specifically direct the NRC to consider prior "convictions" as a part of the background evaluations performed with respect to these individuals. 10 C.F.R.

---

1. The personnel access authorization program must be drafted as part of a licensee's application for an operating license, and must be maintained for NRC review. 10 C.F.R. § 50.34(p)(2) (1993).

§ 10.11(a)(8),(9) (1993). The NRC's specific reference to the term "convictions" in these other NRC regulations is strong evidence that when the NRC broadly directed licensees "to develop information" concerning the "criminal history" of applicants for access to nuclear power plants it intended to require, or at least permit, licensees to inquire about both convictions and arrests.

Under certain circumstances specified in its regulations, the NRC permits licensees to deny access to anyone who has been arrested but not convicted. *See* 10 C.F.R. § 73.57(c)(i) (1993).[2] Obviously, a licensee must be permitted to ask applicants about their prior arrest records to determine whether denying unescorted access because of these arrests is appropriate.

Finally, the NRC is aware that licensees obtain complete arrest record information from the FBI pursuant to the fingerprinting procedures set forth in the Security Act. That statute was enacted to ensure that licensees obtain complete criminal history reports concerning all unescorted access applicants. 42 U.S.C.A. § 2169(a). The NRC regulations promulgated under the Security Act also state that the record obtained from the FBI must be reviewed by the licensee "as *part* of a criminal history records check." 10 C.F.R. § 73.57(b)(8)

---

2. Under the Security Act and the NRC's regulations, a licensee may not deny unescorted access "solely on the basis of an arrest that is more than one year old . . . or an arrest that resulted in dismissal" of the charge. By using the phrase "solely on the basis of" before the references to arrests that are more than one year old or arrests that resulted in a dismissal of the charge, the Security Act and the NRC regulations permit licensees to consider such arrests along with other factors in determining whether to grant access to nuclear power plants. In other words, Niagara Mohawk and other NRC licensees may inquire into all arrests and may consider those arrests along with other factors in determining whether to grant unescorted access to its plants.

(1993) (emphasis added). Thus, the regulations permit licensees to supplement the information received in the FBI report by other methods. This requirement clearly contemplates that licensees will make direct inquiries into the applicant's criminal history as part of general background checks.

Justice Hayes found that the governing statutes and NRC regulations required, or at least permitted, Niagara Mohawk to inquire into Petitioner's prior arrest record. Therefore, he determined that Petitioner could not show how Niagara Mohawk's inquiries or action violated the language set forth in the Human Rights Law. Justice Hayes' decision was affirmed by the New York appellate courts and provides one independent state law basis for the dismissal of Petitioner's interpretation of Human Rights Law requirements.

B. Petitioner Was Not Protected by the Human Rights Law Because He Misrepresented His Criminal History.

Justice Hayes also determined that Petitioner was not protected by the Human Rights Law because he "was less than truthful on his certification application." (Petition, App. 8). This determination is also consistent with prior rulings by the New York courts. The Human Rights Law has never been interpreted to prevent employers from taking adverse employment action against individuals, such as Petitioner, who fail to respond honestly to inquiries on an employment or other application.

In *Stewart v. Civil Service Commission*, 446 N.Y.S. 2d 948 (1st Dep't 1982), the New York Appellate Division, First Department, rejected a Human Rights Law complaint brought by an applicant who was rejected after misrepresenting his

criminal history on a personal history questionnaire. The court explained:

> There is nothing in the record to indicate that [the applicant] was penalized because of his prior criminal record. What is obvious from the record is that [the applicant] was disqualified simply because he had lied on his application. Misstatement of a material fact about one's personal history warrants disqualification.

Id. at 950 (citations omitted).

Justice Hayes' final ruling in this case is similar to that in *Stewart,* which was based entirely upon interpretation and application of New York state law. Under these circumstances, Niagara Mohawk respectfully submits that this Court should decline to review this petition in accordance with "the independent and adequate state ground doctrine." *Coleman v. Thompson,* 501 U.S. at 729.

II.

THE STATE COURT DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

Even if this Court had jurisdiction over this petition, there is no substantive basis to grant certiorari in this case because the New York state courts did not decide an important question of federal law in a way that conflicts with prior decisions of this Court or of other federal courts.[3] The determination that

---

3. *See* Rule 10 of the Rules of the Supreme Court.

Petitioner's Human Rights Law claims were preempted by the federal nuclear regulatory laws, in fact, is fully consistent with relevant prior decisions and should not be disturbed.

This Court has repeatedly held that federal preemption of conflicting state laws ". . . is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In addition to express preemption, the federal courts recognize two types of implied federal preemption of state laws: (1) field preemption, where the scheme of federal regulation is so pervasive as to leave no room for state regulation (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)); and (2) conflict preemption, where "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)), or where state law "stands as an obstacle to accomplishment of the execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Justice Hayes' decision does not specify which preemption doctrine he found to have precluded Petitioner's Human Rights Law claims. Nevertheless, it is clear that each of the preemption theories is applicable in this case.

A. The Security Act Expressly Preempts the Human Rights Law's Restrictions On Criminal History Inquiries.

The Security Act explicitly requires NRC licensees "to fingerprint each individual who is permitted unescorted access to the facility . . ." 42 U.S.C.A. § 2169(a). The Security Act additionally directs licensees such as Niagara Mohawk to submit those fingerprints to the NRC, which in turn forwards

them to the FBI through the United States Attorney General. *Id.* The NRC licensee then receives from the FBI a report on both arrests and convictions. With respect to the procedure by which a licensee receives arrest information, the Security Act provides, in pertinent part, that:

> *Notwithstanding any other provision of law,* the Attorney General may provide all the results of the search to the Commission, and, in accordance with regulations prescribed under this section, the Commission may provide such results to the licensee or applicant submitting such fingerprints.

Id. (emphasis added).

The Security Act phrase — "notwithstanding any other provision of law" — expressly forecloses Petitioner's argument that Niagara Mohawk was prohibited from inquiring into or considering the prior arrest record of an unescorted access applicant. The legislative history behind the Security Act confirms that Congress wanted licensees to obtain and consider this information:

> [T]he bill will help to ensure that only individuals who are reliable and trustworthy have access to critically sensitive areas thereby significantly improving the security of the nuclear power facility. *By allowing nuclear power reactor operators to have access to the FBI's criminal history records files, they would be able to obtain more complete criminal histories.* That information is an *essential element* in the determination of who should be granted unescorted access to nuclear facilities.

S. Rep. No. 143, 99th Cong., 1st Sess. 1 (1985) (emphasis added).

Because the plain language and the legislative history of the Security Act expressly authorized Niagara Mohawk — "notwithstanding any other provision of law" — to obtain and consider a complete criminal history report on Petitioner, including information about his prior arrests, any contrary interpretation of the Human Rights Law would be unenforceable under the doctrine of express federal law preemption.

B. Petitioner's Human Rights Law Arguments Conflict With Federally Mandated Nuclear Safety And Security Requirements.

This Court has previously determined that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Electric v. State Energy Resources Conservation and Dev. Comm'n, et al.*, 461 U.S. 201, 212 (1983). *See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 550 (1978). Several other federal courts have similarly held that the federal government has exclusive authority to regulate all aspects of the nuclear safety and security field. *See, e.g., County of Rockland v. NRC*, 709 F.2d 766, 770 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1150 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778 (D.C. Cir. 1968).

The broad preemptive effect of these nuclear safety and security laws has also been uniformly acknowledged by the federal courts. *See, e.g., Pacific Cas. & Electric v. State Energy*

Resources Conservation and Dev. Comm'n et al., 461 U.S. at 212;*Northern States Power Co. v. Minnesota*, 447 F.2d at 1150. This Court's decision in *English v. General Electric Co.*, 490 U.S. 72 (1990) is not to the contrary. In *English*, this Court ruled that ". . . not every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field." 496 U.S. at 85. However, this Court also stated in *English* that a state law will ". . . fall within the pre-empted zone, [if it has] a direct and substantial effect on the decisions of those who build or operate nuclear facilities." *Id.*

Petitioner's arguments in this case do not involve issues that "in some remote way" relate to nuclear safety. *Id.* Rather, the unescorted access requirements and procedures applied by Niagara Mohawk in this case are "directly and substantially" related to nuclear safety issues. *Id.* Indeed, the express purpose of the NRC regulations, which Niagara Mohawk followed in this case, is to ensure that individuals who are granted access to nuclear power plants are "trustworthy and reliable" and do not pose "an unreasonable hazard or risk to the public health and safety." 10 C.F.R. § 73.56(a). Thus, if the Human Rights Law were interpreted as Petitioner urges, it would overlap and intrude upon the area of nuclear safety and security and would "fall within the pre-empted zone" identified by this Court in *English* and earlier decisions. 496 U.S. at 85.

The New York State Court determination that federal law preempts Petitioner's Human Rights Law claim is fully consistent with the prior decisions of this Court and the other federal courts. Accordingly, even if this Court finds that it has jurisdiction over the petition, Niagara Mohawk respectfully submits that the petition must be denied because there is no substantive basis for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT W. KOPP
Counsel of Record
BOND, SCHOENECK & KING
Attorneys for Respondent
One Lincoln Center
Syracuse, New York 13202-1355
(315) 422-0121